United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1358

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1358

UNITED STATES OF AMERICA

Libellant-Appellee

vs.

FORTY THREE THOUSAND FIVE HUNDRED
NINETY SIX DOLLARS ($43,596.00)
IN UNITED STATES CURRENCY, ETC.

BRIEF OF CLAIMANTS-APPELLANTS

JACK AND MARION JACOBSON

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STATEMENT OF THE CASE

The claimant Jack Jacobson was arrested in November of 1960 on charges of having violated the United States Code provisions then requiring the purchase of a gambling occupational tax stamp, 26 U.S.C. §4411 and 7203. At the time of the arrest, Special Agents of the Internal Revenue Service seized $43,596.00 in currency in petitioners' house. The government was never very proud of its case against Jacobson and, in May of 1962,

about a year and half later, moved to dismiss its own indictment. Contemparaneous with dismissal of the criminal charges, the United States instituted these forfeiture proceedings. (2a). On July 16, 1963, based upon a stipulation between claimants and the government, the Honorable William H. Timbers in effect entered judgment in the action, ordering $5,000.00 forfeited and paid to the United States and the balance paid over to claimants.(3a)

The legal basis for the forfeiture here was overthrown by the United States Supreme Court in 1968 when that court held, in Marchetti vs. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), that the statutory requirements of registration and payment of wagering taxes were inconsistent with the Fifth Amendment's privilege against self-incrimination. Three years later the court accorded complete retroactivity to Marchetti and Grosso in forfeiture proceedings. United States v. U.S. Coin and Currency, 401 U.S. 715 (1971). This petition, brought pursuant to Rule 60(b), Federal Rules of Civil Procedure, seeking post judgment relief from Judge Timbers' order was brought late in September of 1973. (8a-10a) After briefing by both sides and argument on November 12, 1973, Judge Newman ruled, on December 19, 1973, that, in the absence of any justification for delay, claimants had waited too long after the ruling in Coin and Currency before seeking relief--in

effect turning them away on an equitable laches theory. (5a-7a)

On January 2, 1974, petitioners Moved to Reargue (11a) and, by way of affidavit, sought to give the court "justification" for the "delay". Mr. Jacobson set forth his lack of legal knowledge and swore that he had never heard of the Supreme Court decision in Coin and Currency. He stated that the first inkling he had that he might be entitled to the return of his forfeited money was during the summer of 1973 and that he contacted counsel very shortly thereafter. (12a, 13a) There had been no continuing relationship between claimants and counsel and he was totally unaware of any possibility of relief from the judgment prior to that time. (15a-17a) Judge Newman denied the Motion to Reargue, without further opinion on January 31, 1974. (4a) On February 8th, claimants Noticed their Appeal to this court. (4a)

STATUTES INVOLVED

Title 26 U.S.C. §4411

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Title 26 U.S.C. §7202

Any person required under this title to pay any estimated tax or tax, or required by this title or by

regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Title 26 U.S.C. §7302

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

Rule 60(b), Federal Rules of Civil Procedure

(b) Mistakes; Inadvertence; Excusable Neglect: Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a

prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

ISSUES PRESENTED

1. Can a consent order in a forfeiture proceeding, made under duress of criminal statutes now recognized as invalid, be set aside upon a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure?

2. Did the court properly invoke laches against claimants who were laymen and unrepresented by counsel, and who had moved promptly for relief from the earlier judgment as soon as they suspected that such relief was available?

THE FACTS

The matter here in issue stems from the arrest, in November of 1960, of Jack Jacobson, a New Haven businessman and one of the claimants (with his wife) in the forfeiture action. The

arrest by government agents was for alleged violation of the federal gambling tax stamp statutes. At the time of the arrest the officers seized $43,596.00 in currency at the Jacobson home. Although there was no available evidence against Jacobson the government proceeded to indict. A year and a half later, the case collapsed of its own weight, or lack thereof, and the government moved to dismiss. Notwithstanding its total inability to establish a case on the criminal charges, the government nonetheless continued to tie up the money by bringing the forfeiture action. Finally, after having been without their money for close to three years--and the end of the litigation apparently still years away, the Jacobsons consented to a forfeiture order as to $5000--or about 12% of the money, in order that they might recover the balance. When that order entered, the underlying criminal statutes had been approved by the United States Supreme Court, Lewis v. United States, 348 U.S. 419 (1955), United States v. Kahriger, 345 U.S. 22 (1952). The allowance of a criminal forfeiture of claimants' property could not have been properly informed or voluntary. United States v. Summa, F. Supp.(D. Conn 1972), aff'd per curiam, August 14, 1973; United States v. Lewis, F. 2d (5 Cir. 1973), Doc. Nos. 72-2524 and 72-2470. They had not in fact effectively waived their privilege against self-incrimination in consenting to the forefeiture judgment; the stipulation, like

the pleas in Summa were coerced by the then possibility of a total criminal forfeiture, based upon the unconstitutional statutory scheme.

The Jacobsons were represented throughout the original criminal case, the forfeiture and related income tax negotiations by the undersigned or his law frim. That representation ceased about a decade ago and, between that time and last summer there was no professional relationship between the Jacobsons and counsel. Claimants are not lawyers and at no time did they learn of the fact or possible significance of the Supreme Court decision in United States v. U.S. Coin and Currency, 401 U.S. 715 (1971) until the summer of 1973. Shortly, thereafter, they contacted counsel. As for the actions of counsel, we never connected the decision in Coin and Currency with the long settled Jacobson problem nor would it have been proper, if we had, to hunt out the Jacobsons for the purpose of seeking to litigage the issue. (15a-17a)

ARGUMENT

I. RULE 60(b) PROVIDES RELIEF TO THE CLAIMANTS FROM CIVIL ORDERS BASED UPON UNDERLYING CRIMINAL STATUTES.

The language of Rule 60(b) is broad enough to provide a wide range of relief:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment...

The Supreme Court has held that a federal court has the power to modify or upset a judgment even when based on the consent of the parties, United States vs. Swift & Co., 286 U.S. 106 (1932). In System Federation No. 91, Railway Employees' Department v. Wright, 364 U.S. 642 (1961), a railroad employee's union had consented to judgment against them and to an order prohibiting coercion of nonunion employees. The consent was based, in part, upon the then applicable statutes which forbade the "closed shop". Subsequent to the consent decree, Congress changed the law to permit a closed shop, and the union then brought a 60(b) motion to modify the decree. In reversing the District Court's refusal to exercise discretion to modify the decree, the Supreme Court emphasized that the stipulation between the original parties could only refer to the law "as it read at the time of the consent decree," System

Federation No. 91, Railway Employee's Department v. Wright, supra, at 652:

> "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant -- one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable. The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute."
>
> Id.

Rule 60(b) is, of course, available to modify orders in forfeiture and admiralty proceedings, Wright & Miller, Federal Practice and Procedure: Civil §2852. The logic of Systems Federation is directly applicable to a consent order in a forfeiture proceeding, where the consent was based upon criminal statutes subsequently held unconstitutional. Were it not for the then existence of the unconstitutional statutes the forfeiture proceeding could not have been begun.

The applicable portions of Rule 60(b) are subsection 5 and 6--that "it is no longer equitable that the judgment should have prospective application," or "other reason justifying relief from operation of the judgment". Here, the claimants consented to a partial forfeiture because they relied upon the decisions of the Supreme Court which had upheld the constitutionality of the gambling tax stamp statutes. Lewis v. United States, 348 U.S.

419 (1955); United States v. Kahriger, 345 U.S. 22 (1952). Those decisions have been overruled, and there is therefore no constitutional basis for the forfeiture proceedings. This court has recognized that even if an order is assumed proper when issued, a change in conditions may render its continued enforcement inequitable, Schildhaus v. Moe, 225 F. 2d 529 (2 Cir. 1964)

In the instant case, had the claimants been convicted pursuant to the underlying criminal statutes they would be entitled to the same relief here requested under Rule 60(b). United States v. U.S. Coin and Currency, supra; United States v. Summa, supra. It would be inequitable in the extreme if claimants, who were not convicted of the underlying criminal charges, should for that reason be denied recovery of forfeited money, when others convicted of such charges are able to recover money they forfeited. See also Klapprott v. United States, 335 U.S. 601 (1949).

This court has affirmed Judge Blumenfeld's holding in the Summa cases that fines paid in criminal cases, based upon guilty pleas, must be remitted in light of Coin and Currency. It would be grossly unfair to relieve a criminal defendant of the effect of "his bargain" based upon his guilty plea--and to hold these claimants, who were never convicted and against whom the government had no case, to a "bargain" made under not only the duress

of the unconstitutional statute, but also under the duress of their having had their $43,596.00 tied up for almost three years and for the then forseeable future. The sovereign ought to return this money; this court can and should order it to do so.

II. UNJUSTIFIED DELAY SUFFICIENT TO PRECLUDE RELIEF PURSUANT TO RULE 60(b) (6) MUST INVOLVE SUBSTANTIAL FAULT ON THE PART OF THE MOVANT.

Judge Newman's decision below recognized that the court has power to grant claimants relief from the order here, but relied on the timing of claimants' motion to deny them their money. A review of the cases in which Rule 60(b) (6) relief was denied for unjustified delay reveals that in each case the movant had clearly failed to pursue readily available remedies of which he had adequate notice. A close look at the cases cited by the Court below and at the two additional cases noted in the Government's brief to the District Court is particularly illuminating. In Carrethers v. St. Louis-San Francisco Railway Co., 264 F. Supp. 171 (N.D. Okla, 1967), the court refused to vacate defendant's judgment which had entered because of plaintiff's failure to respond to a motion to dismiss. The court found that the plaintiff knew of the dismissal within two months of its occurence, but did nothing for two years. It specifically noted that the plaintiff did not discuss the dismissal with his attorney. Thus,

judgment entered due to plaintiff's failure to act; the failure to move timely to reopen was also a "knowing" failure on plaintiff's part. In Ohliger vs. United States, 308 F. 2d. 667 (2d Cir., 1962), a personal injury action was dismissed for plaintiff's failure to answer interrogatories. This court noted that such a failure was not the kind of "excusable neglect" contemplated by Rule 60(b), focusing on the carelessness of counsel as the element of fault which precluded relief. Similarly, Cucurillo vs. Schulte, Burns, Schiff Gessellschaft, M.B.H., 324 F. 2d. 235 (2d Cir., 1963), upheld the refusal of 60(b) relief from the dismissal of another personal injury case; counsel's knowing neglect was there too the crucial factor in denying relief. In contrast to the instant case, the court there noted the ongoing professional relationship between client and lawyer.

MacLeod v. D.C. Transit System, Inc., 283 F. 2d. 194 (D.C. Cir., 1960), involved the settlement of a personal injury action; the parties had there been informed by counsel of the variety of disputed issues involved in the case. A motion to vacate was brought almost a year later. The court, in rejecting it, held the delay to be unreasonable, as the movants were at all times aware of their legal claims and of their potential problems in litigation, which had in no way changed since entry of judgment.

See also Robinson v. E.P. Dutton & Co., 45 F.R.D. 360 (1968) and Sunbeam Corp. v. Charles Appliances, Inc., 119 F. Supp. 492 (S.D. N.Y., 1953). In every single one of the above cases, where relief was denied, the movant was "at fault" in the sense that the problem and the basis for a remedy was known at all times, and the movant knowingly slept on his rights.

Before a movant may be held responsible for unreasonable delay, he must have actual notice of rights available to him to pursue. Radack v. Norwegian America Line Agency, Inc., 318 F. 2d. 538 (2d. Cir., 1963). In Radack the court held timely a motion to vacate filed soon after actual notice of a judgment was received -- despite the fact judgment had entered some fifteen months earlier. In Byron v. Bleakley Transportation Co., 43 F.R.D. 413 (1967) an eighteen month delay in bringing a motion to vacate was excused because defendant had, through no fault of his own, not received notice of a default judgment. The use of actual notice in determining the reasonableness of delay in filing a Rule 60(b) (6) motion is much more consistent with the purposes of the rule as a residuary power necessary to cover unforseen contingencies. J. Moore, Federal Practice ¶60.27 [1].

III. NO UNREASONABLE DELAY CAN BE ASCRIBED TO CLAIMANTS BASED EITHER ON THEIR OWN ACTIONS OR ON THE ACTIONS OF COUNSEL WHO WAS NOT REPRESENTING THEM AT THE CRUCIAL TIME OF THE CHANGE IN LAW.

The affidavits filed in support of the Motion to Reargue established a factual background free of unreasonable delay and appropriate for equitable relief. Quite simply, the claimants, a businessman and his wife, are not attorneys and, not surprisingly, did not hear about United States vs. United States Coin and Currency, 401 U.S. 715 (1971), either when it was decided or reported in legal reporters, and for some two years thereafter. They can hardly be held to have unreasonably delayed in pursuing their rights, when they did not have any way to know of those rights until they heard rumors concerning the criminal fines late in the summer of 1973. Nor can their attorney, who had not represented them for the better part of a decade be held to have acted unreasonably, either in not calling the long dead case to mind, or in not "chasing" the former client to reopen the judgment. To require the attorney to recall a dead file in that way would be unreasonable; busy attorneys are hard pressed enough to service their present clients properly. To require the calling of the ex-client, at least bordering on barratry, would truly be wrong. This motion, simply, was made at the first realistic opportunity available to claimants.

IV. DENIAL OF RELIEF WAS AN ABUSE OF DISCRETION FOR THE COURT BELOW.

We humbly submit that the facts in this case strongly cry out for granting the relief requested. We are faced with a

situation where persons convicted under a statute subsequently held unconstitutional are recovering their criminal fines, based upon coram nobis petitions brought at virtually the same time as, or later than, this petition;*here, where the criminal case was so weak the government could not prosecute, and where the forfeiture claim was so weak that the government accepted virtually a nuisance settlement, petitioners have been turned away on a laches type theory. Under these circumstances, we think the court's equity powers should and must, in the exercise of any fair discretion, be invoked to provide relief. The failure of the court below to provide such relief exceeded the limits of its discretion.

CONCLUSION

For all of the foregoing reasons, the decision below should

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*The government in the District of Connecticut has stipulated to judgment in favor of defendants filing application for writs of coram nobis October 1, 1973 in United States vs. Fabrisio, Crim. No. 10840; United States v. Julius DelGreco, Crim. No. 10841; United States v. Daniel Sullivan, Crim. No. 10842; United States v. David Gurevich, Crim. No. 10839; United States v. Anthony Cari, Crim. No. 10844; United States v. Frank Cremola, Crim. No. 10848; United States v. Lucille Basti, Crim. No. 10850; United States v. Ralph Demusis, Crim. No. 10851; United States v. Thomas Cari, Crim. No. 10853; United States v. Louis Pesticci, Crim. No. 10874, and as recently as February 1, 1974: United States v. Peter Iovene, Crim. No. 10904.

be reversed, and the claimants should be granted relief.

RESPECTFULLY SUBMITTED

By _____

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OUR FILE NO.

April 10, 1974

A. David Fusaro, Clerk
United States Court of Appeals
Foley Square
New York, New York 10007

Re: United States v. Forty Three Thousand Five Hundred Ninety Six Dollars, Etc.
Docket Number 74-1358

Dear Mr. Fusaro:

I am enclosing herewith twenty five copies of appellants' brief and ten copies of appellants' appendix on the above file.

I hereby certify that copies have been served this day on Harold J. Pickerstein, Esq., office of the United States Attorney, Bridgeport, Connecticut by first class mail.

Very truly yours,

JACOBS, JACOBS & GRUDBERG, P.C.

By _____
IRA B. GRUDBERG

IBG/hrk
Encl.